In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-748

RALPH E. PURVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. B, A-12 to A-14) is reported at 344 F. Supp. 785. The opinion of the court of appeals (Pet. App. A, A-1 to A-11) is reported at 501 F.2d 311.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1974. A petition for rehearing *en banc* was denied on September 30, 1974. The petition for a writ of certiorari was filed on December 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

On July 18, 1963, President Kennedy proposed to Congress an "interest equalization tax" to be effective on that date. The statute (Section 4911, *et seq.*, of the Internal Rev-

enue Code of 1954) providing such tax became law on September 2, 1964, effective July 18, 1963.

The question presented is whether the application of the tax to petitioner's acquisition of Canadian securities between those two dates is constitutional.

STATUTES INVOLVED

Interest Equalization Tax Act, Pub. L. 88-563, 78 Stat. 809, 841:

> Sec. 2. Interest Equalization Tax.
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> * * * * *
>
> (c) *Effective Date.*—
>
> (1) *General rule.*—Except as provided by paragraphs (2), (3), (4), (5), (6), and (7), the amendments made by this section shall apply with respect to acquisitions of stock and debt obligations made after July 18, 1963.
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> * * * * *

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 4911 [as added by Sec. 2(a), Interest Equalization Tax Act, Pub. L. 88-563, 78 Stat. 809] Imposition of Tax.
>
> (a) *In General.*—There is hereby imposed, on each acquisition by a United States person (as defined in Section 4920(a)(4)) of stock of a foreign issuer, or of a debt obligation of a foreign obligor (if such obligation has a period remaining to maturity of 3 years or more), a tax determined under subsection (b).
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> * * * * *

STATEMENT

On July 18, 1963, President Kennedy delivered an economic message to both houses of Congress in which he proposed a series of coordinated actions to alleviate the serious balance of payments deficit and to strengthen the United States dollar. One proposal was an "interest equalization tax" to be levied on the purchase by United States persons of foreign securities from foreign persons. The purpose of this tax was to restrict long-term capital outflow from the United States by making it more expensive to borrow in the American market and to encourage United States persons to invest in domestic securities (Pet. App. A, A-2; Pet App. B, A-12).

In his message, the President made it clear that if this tax was to achieve its purpose, it was essential for it to be made effective from the date of his message, July 18, 1963. If the tax were not made effective as of the announcement, a rush by investors to take steps in advance of its enactment would have served to aggravate the problem and rendered the proposal self-defeating.[1] Further, the President made it clear that to be effective the tax must be applicable to all purchases by United States persons of new or outstanding foreign securities from foreign issuers or owners. The Act in substantially the form proposed by the President was signed into law September 2, 1964, with an effective date of July 18, 1963 (Pet. App. A, A-2 to A-3; Pet. App. B A-12 to A-13).

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[1]See H. Rep. No. 1046, 88th Cong., 1st Sess., pp. 8, 11, 13; S. Rep. No. 1267, 88th Cong., 2d Sess., pp. 9-10; Hearings before the House Committee on Ways and Means on the Interest Equalization Tax Act, H.R. 8000, 88th Cong., 1st Sess., pp. 8-9, 70, 155, 186-187.

The President's message was well publicized in the newspapers and financial journals. On the day the message was sent to Congress, the Treasury Department issued two documents giving the details of the proposed tax, and on August 16, 1963, the text of the proposed Act was published in the Federal Register. As a result, the public was informed of the proposed immediate effectiveness of the tax. In fact, the publicity with respect to the effective date of the tax both in the United States and abroad caused the market in foreign securities to fall and the market for United States Government securities to advance (Pet. App. A, A-2; Pet. App. B, A-13).

Between July 18, 1963, and August 2, 1964, petitioner, a resident of the State of Washington, purchased various Canadian stocks through his Canadian broker in Victoria, British Columbia. The purchases were made with Canadian dollars purchased prior to July 18, 1963. Petitioner knew of the President's message of July 18, 1963, and was aware of nothing that would exempt his transactions from the tax. In fact, petitioner joined with other investors in unsuccessful efforts to have the tax modified by Congress to exclude transactions not involving "outflow" (Pet. App. A, A-2 to A-3; Pet. App. B, A-13).

Petitioner paid the interest equalization tax required by the Act and filed a claim for refund alleging that the Act as applied to the purchases made before it was enacted was unconstitutional. In a refund suit brought by petitioner after the disallowance of his claim, the district court held that the Act as applied to petitioner's purchases between July 18, 1963, and September 2, 1964, was constitutional (Pet. App. B, A-12 to A-14). The court of appeals affirmed (Pet. App. A, A-1 to A-6).

ARGUMENT

Petitioner argues (Pet. 5-10) that Congress cannot constitutionally give retroactive application to an entirely new form of tax even if there is advance notice to the public of the proposed retroactivity. He contends that a tax may be retroactively imposed only if the tax is not imposed on a voluntary act, the rate of tax is increased and the tax has been traditionally retroactively imposed. Petitioner relies upon four decisions of this Court in which retroactive impositions of estate and gift taxes were held unconstitutional. *Nichols* v. *Coolidge,* 274 U.S. 531; *Blodgett* v. *Holden,* 275 U.S. 142; *Untermyer* v. *Anderson,* 276 U.S. 440; and *Coolidge* v. *Long,* 282 U.S. 582.

As the court of appeals held, the decisions relied upon by petitioner do not support his broad constitutional claim. In those cases, there was no public notice that the tax would be effective prior to the date of its enactment. In fact, there was serious disagreement among the members of the Court whether Congress intended the statutes at issue to have an earlier effective date. Thus, they are not authority for the proposition petitioner urges, *i.e.,* that Congress cannot constitutionally enact a taxing statue with an effective date prior to the date of enactment even if there is public notice that the statute would be effective as of the Executive's legislative request.

This Court has never so limited the congressional power to impose taxes. For example, in *United States* v. *Hudson,* 299 U.S. 498, 500-501, the Court referred to its longstanding approval of the Congressional practice to make tax statutes retroactive to include the period in which the statute was in the process of enactment. See *e.g., Stockdale* v. *Insurance Cos.,* 20 Wall. 323, 331, 332, 341; *Lynch* v. *Hornby,* 247 U.S. 339, 343; *Cooper* v. *United States,* 280 U.S. 409, 411; *Milliken* v. *United States,* 283 U.S.

15, 21. And in *Welch* v. *Henry*, 305 U.S. 134, 147, the Court emphasized the limited scope of the decisions upon which petitioner relies, stating that they "rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event." The Court noted that (*ibid.*):

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Here, petitioner could have reasonably anticipated the application of the interest equalization tax to his purchases of Canadian securities. There was abundant notice, beginning with the announcement, that the tax would be effective as of the date of the President's message. The proposed effective date was well publicized in Treasury publications, in the Federal Register, and in the press. Indeed, petitioner was well aware that the tax would be applicable to the transactions involved, because he unsuccessfully sought to have Congress exempt his transactions from this tax.[2]

Moreover, the decision below follows *a fortiori* from *Norman* v. *B. & O. R. Co.*, 294 U.S. 240. There, the Court sustained, as a valid exercise of the power of Congress to protect the value of the currency, a statute which abrogated payment clauses in contracts executed between private parties decades before there was any notice that a law would be enacted to make such clauses illegal. See also

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[2]Petitioner also argues (Pet. 10-14) that the notice with regard to the application of the interest equalization tax to purchases of foreign securities with foreign funds without the country was inadequate. But this contention has no basis in fact, for petitioner himself stated that he knew of nothing in the proposed act that would exempt such purchases from the tax. Indeed, he actively sought to have the President's proposals changed to exempt such purchases from the tax.

Guaranty Trust Co. v. *Henwood,* 307 U.S. 247.[3] And in *Louisville & Nashville R.R.* v. *Mottley,* 219 U.S. 467, the Court sustained as a valid exercise of Congress's power to regulate commerce the prohibition of using a railroad pass as a substitute for posted fare even though the pass was valuable property acquired for valuable consideration under a contract long before the statute was enacted.

If the deprivation of these previously acquired property rights was constitutionally valid, certainly petitioner's right to acquire foreign securities without payment of the tax, after notice that the tax would be effective as of the date of the Executive's request for the tax, is not beyond the constitutional power of Congress to protect the value of the currency or to regulate commerce. As the court of appeals pointed out (Pet. App. A-6), this Court has approved the collection of a tax prior to congressional approval so long as Congress ultimately approves it. *United States* v. *Heinszen & Co.,* 206 U.S. 370.

Finally, the decision below is essentially on all fours with the recent decision of the Court of Claims in *First National Bank in Dallas* v. *United States,* 420 F.2d 725, certiorari denied, 398 U.S. 950. There, the court upheld the power of Congress to set the effective date of the Interest Equalization Act prior to the date of its enactment.[4] Although petitioner (Pet. 10-11) attempts to dis-

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[3]See also *Perry* v. *United States,* 294 U.S. 330, 356, where the Court said that the power to coin money includes the power to impose restraints upon transactions in foreign exchange.

[4]The Interest Equalization Act expired on June 30, 1974. Section 4911(d), Internal Revenue Code of 1954, as amended by Section 2, Pub. L. 93-17, 87 Stat. 12.

tinguish that case on the ground that there was an outflow of dollars during the period from July 18, 1963, to September 2, 1964, that distinction is without constitutional or statutory significance.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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